Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BYRON MCCOY,

Petitioner,

vs.

CITY OF MOBILE,

Respondent.

On Petition For Writ Of Certiorari
To The Alabama Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. WING
Attorney for Petitioner
107 St. Francis Street, Ste. 2501
Mobile, Alabama 36602
(251) 433-7468

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. THE CITY ORDINANCE IN QUESTION IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED AND IN DIRECT CONFLICT WITH *SHUTTLESWORTH V. BIRMINGHAM*.

II. PETITIONER WAS DENIED HIS TRIAL BY JURY WHEN THE TRIAL COURT MADE FINDINGS OF DISPUTED FACT WITHOUT ALLOWING THE JURY TO MAKE THE FINDINGS.

III. THE CITY ORDINANCE IN QUESTION PROMOTES VIOLATION OF EQUAL PROTECTION RIGHTS OF THE PETITIONER AND ALL BLACK CITIZENS IN MOBILE, ALABAMA.

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OPINIONS BELOW

The Petitioner was charged with resisting arrest and failure to obey in Mobile Municipal Court. Petitioner was convicted in Mobile Municipal Court of resisting arrest and failure to obey. *See Mobile Municipal Court Case Action Summary Sheet appended hereto as Appendix "D."* Petitioner then appealed to the Mobile County Circuit Court pursuant for a trial *de novo* pursuant to Rule 30.1, Ala.R.Crim.P., where the jury returned a guilty verdict as to the count of resisting arrest, and there was a mistrial on the failure to obey count. *See Mobile Circuit Court Case Action Summary Sheet appended hereto as Appendix "C."* The Alabama Court of Criminal Appeals affirmed the jury verdict by an unpublished opinion released on January 7, 2005. *See Petitioner v. City of Mobile, CR-03-1159, appended hereto as Appendix "A"* Petitioner filed an application for rehearing pursuant to an adverse ruling on his appeal to the Alabama Court of Criminal Appeals. The application for rehearing was denied. Petitioner subsequently filed a writ of certiorari to the Alabama Supreme Court. *See Certificate of Judgment appended hereto as Appendix "E"* The Alabama Supreme Court denied certiorari. The Alabama Court of Criminal Appeals then made the judgment final on April 8, 2005. *See Certificate of Judgment appended hereto as Appendix "B"*

STATEMENT OF JURISDICTION

The Mobile County Circuit Court had jurisdiction over this criminal case after Petitioner was convicted in Mobile County Municipal Court pursuant to Alabama Code 1975 Section 12-14-70. An appeal from that Court's final judgment proceeded for review by the Alabama Court of Criminal

Appeals in accordance with Rule 28(a)(3) of the Alabama Rules of Appellate Procedure. This Court's jurisdiction is invoked by timely filing of Petitioner's Writ of Certiorari. See 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MOBILE CITY CODE SECTION 39-54 – FAILING TO OBEY DIRECTION OR ORDER OF POLICE OFFICER

(a) It shall be unlawful and an offense against the city for any person to fail to obey the direction or order of a member of the police department of the city while such member is acting in an official capacity in carrying out his duties.

(b) Any person found guilty of violating the provisions of this section shall be punished as provided in chapter 1, article II, City Code (1991). (Code 1965, Sec. 47-6.1)

ALABAMA CODE 1975 SECTION 32-5A-4.
COMPLIANCE WITH LAWFUL ORDERS

No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer or fireman invested by law with authority to direct, control or regulate traffic. Acts 1980s, No. 80-434.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner was convicted in Mobile County Municipal Court for resisting arrest and failure to obey. Petitioner appealed to the Mobile County Circuit Court pursuant for a trial *de novo* pursuant to Rule 30.1, Ala.R.Crim.P., where the jury returned a guilty verdict as to the count of resisting arrest and there was a mistrial on the failure to obey charge. The Alabama Court of Criminal Appeals affirmed the jury verdict by an unpublished opinion released on January 7, 2005. Petitioner filed an application for rehearing pursuant to the adverse ruling by the Alabama Court of Civil Appeals. The application for rehearing was denied. Petitioner subsequently filed a writ of certiorari to the Alabama Supreme Court. The Alabama Supreme Court denied certiorari. The Alabama Court of Criminal Appeals then made the judgment final on April 8, 2005.

B. Statement of the Facts[1]

1. Petitioner, a distinguished officer exemplifying professional policing, was a "go-to" kind of cop relied upon for jobs requiring skill and stamina. (CR-82-87)

2. Petitioner is a hard worker, good neighbor and accomplished officer as well as accomplished honorably discharged army sergeant. (CR-37-87)

3. The failure to obey ordinance is charged over three (3) times as often against African Americans as it Caucasians. (Court's Exhibit #2, R-418-420.)

4. The Petitioner is a black male and the officers charging him are white. (Court's Exhibit #4, R-423, 426, 3-08-04 – 10-11)

5. One month before the event in question, the Petitioner's wife had stayed out past 3:00 AM, and there been such a discussion about that that Petitioner and his wife had agreed that neither one would stay out without the other past 2:00 AM, but on the date in question, the Petitioner stayed out until 3:00 AM and this made his wife angry enough to lock the storm door to which the Petitioner did not have a key, so he was locked out of his own house. (R-232-236)

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[1] The numbering of the record pages is somewhat confusing in this particular record because there is in Volume 1 CR (Clerk's Record pages 1-102, then pages 1-59, which is the 2-13-04 pretrial transcript, then R1-R21, which is the 3-10-04 transcript of post-trial proceedings, then 1-17, which starts the trial testimony transcript beginning on 3-08-04 and continuing until 3-10-04 through the other two volumes referred to by an "R" preceding the page cites in this brief. CR precedes the first occurrence of the first pages numbered 1-102 in Vol. 1. The remaining cites to pages include the date of testimony to identify the correct page where lower numbers (below 59) are cited.

6. The Petitioner, when he got home at approximately 3:00 AM, could not get into his house because his wife had locked the storm door. When his wife did not come to the door, the Petitioner went to the bedroom window to tap on the glass. His wife did not respond. The Petitioner accidentally broke that window, but it was not a good window to make entry into the house, so the Petitioner went to another window through which he could more easily enter his home. (R-236-239, 253-255)

7. The Petitioner never threatened his wife. No communications were had between the two until the Petitioner was attempting to enter through the second window at which time the wife first spoke to the Petitioner with the phone in her hand stating that, "If you break another window, I will call your boys." (R-255-256, 237-239)

8. Once the Petitioner's wife called the police, the Petitioner returned to the front porch to wait for the police to arrive believing he would be able to go into his home because he had broken no laws. (R-243, 256-258)

9. The Petitioner was seated on his front porch with his arms crossed with his hands where the police could see them because he was a fourteen (14) year veteran and knew that the officers would want to see his hands. (R-257, 3-08-04 – R-23)

10. The Failure to Obey complaint stated, "The Petitioner smelled strongly of alcoholic beverage on his person and was making loud statements as to what he was going to do to the police officers in a threatening tone." However, it is undisputed that the Petitioner made no threat prior to being physically engaged and cuffed. (R-158) Petitioner's counsel was prevented by the trial court from examining the officer about the underlying facts that would allegedly